

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO: 4657/15

In the matter between:

MUCH ASPHALT (PTY) LTD

Plaintiff

and

CSR-AFRICA TANK REPAIRS CC

Defendant

JUDGMENT

MBENENGE J:

[1] On 02 September 2015 the plaintiff and the defendant, through their duly authorised representatives, concluded a partly written and partly oral agreement in terms whereof it was, *inter alia*, agreed that the defendant would manufacture a 100 ton vertical atmospheric storage unit for the plaintiff. Agreement was further reached that the plaintiff would pay to the defendant a deposit of 40% of the contract price, being an amount of R318 499.13, ¹prior to the manufacture process of the tank commencing.

[2] According to the plaintiff-

¹ The contract price being R796 247.83.

- 2.1 the contract would be time sensitive, and the tank was to be completed, installed and operational by 14 December 2015;
- 2.2 the defendant represented that it would be able to perform timeously in terms of the agreement;
- 2.3 the parties agreed that the manufacture, supply and installation process would take approximately seven weeks to complete; and
- 2.4 the defendant was obliged to communicate with the plaintiff in good time if it was unable timeously to perform in terms of the agreement, so as to enable the plaintiff to make alternative arrangements and to avoid the delay and the resulting financial prejudice.

[3] Adopting the stance that it had paid the requisite deposit, and being of the view that, because as at 30 November 2015 the defendant had not commenced the manufacture process, it would be impossible for the defendant to perform properly in terms of the agreement and complete its task by 14 December 2015, the plaintiff contended that defendant had breached the agreement, entitling the plaintiff immediately to cancel the agreement and to demand repayment of the deposit paid.

[4] By letter dated 02 December 2015, the plaintiff, *inter alia*, informed the defendant of its cancellation of the agreement on the grounds of failure by the defendant to perform, resulting in impossibility of performance by 14 December 2015, and demanded repayment of the deposit paid. The letter was not given heed to by the defendant.

[5] The plaintiff thereupon launched action proceedings whereby it seeks repayment of the amount paid as deposit (R318 499.13), together with interest thereon at of the applicable rate (the main action).

[6] The main action is being defended. The delivery of the relevant notice to defend attracted the launch of summary judgment proceedings for payment of the amount claimed in the main action on the grounds that the defendant lacks a *bona fide*

defence and that the notice to defend has been delivered solely for the purpose of delay.

[7] The *bona fide* defence relied on by the defendant is set out as follows:

- 7.1 time was not of the essence in the contract between the parties;
- 7.2 there was no date agreed upon for the delivery of the bitumen tank;
- 7.3 the plaintiff failed to place the defendant in *mora*, a step necessary before the plaintiff can lawfully cancel the agreement between the parties;
- 7.4 there was thus no breach of the agreement by the defendant;
- 7.5 the plaintiff's purported cancellation amounts to a repudiation of the agreement;
- 7.6 the defendant accepts the plaintiff's repudiation;
- 7.7 as a result of the plaintiff's repudiation, the defendant has suffered a loss of profit; and
- 7.8 the defendant is entitled to resist the claim by the plaintiff, in as much as it also has a counterclaim against the plaintiff.

[8] In amplification of its contention that it has a *bona fide* defence to the action, the defendant went on in the opposing affidavit to state as follows: The plaintiff's representative, Jacques Muller (Mr Muller), emailed the specifications for the bitumen tank to the defendant's representative, Ismail Hassen (Mr Hassen), on or about 20 July 2015. According to the relevant specifications the tank wall thickness would vary at different heights of the tank. Once the concept drawing had been provided to Mr Muller, he gave a go - ahead for construction to commence on 25 September 2015. Subsequent thereto, Mr Muller amended certain specifications on 6 October 2015 and at the same time made enquiries about the completion date for the tank.

[9] The opposing affidavit also refers to an exchange of correspondence between the parties' representatives. On 12 October 2015 Mr Muller required to know from Mr Hassen as to when the expected completion date would be. Mr Hassen responded:

"I had a meeting with my production team and components manufacturers that was outsourced/ long lead items. They have made [provisional] commitment that all the milestones [are] on schedule and therefore will be able to deliver provisionally [during] the second week in December 2015. I will try my best and speed up the process where we can [save] time or work on a dual manufacturing process system."

[10] Mr Muller in turn responded:

"I will need you to speed up the process considerably, I was expecting a date more in the region of beginning to mid November as I need to get the tank in. Please try your best to get it done as a priority item."

[11] The defendant further avers that on 16 November 2015 Mr Hassen advised Mr Muller that the milestones of the project had been achieved to that date and that production would move to a facility in Durban, closer to the site of installation. Subsequent thereto, Mr Hassen was advised by the steel suppliers that the deadline for availability of 10 mm plate steel, as required for the bottom of the tank, was only during the second week of December 2015. Mr Muller was advised of this, and became extremely dissatisfied.

[12] Having been of the view that the due date for delivery would not be met, Mr Muller cancelled the agreement and demanded repayment of the deposit. The relevant portion of the relevant email reads:

"Taking all this into account I require you to pay the money that was paid to you back in full by close of business on Wednesday 2nd December 2015 as we have to get someone else to build [the tank] now and finish it time."

[13] The formal demand letter penned by the plaintiff's attorney of record on 2 December 2015, referred to in paragraph 4 above, in so far as relevant hereto, reads:

"We are further instructed that to date, you have not started the project, and have instead offered our client various contradictory reasons for your failure to perform.

We are further instructed by our client that it will no longer be possible for you to complete the manufacture of the storage until by the 14 December 2015, and you are accordingly in breach of the terms of the contract.

Our client has accordingly cancelled, or hereby cancels, the contract on the grounds of your failure to perform, which has led to impossibility of performance by the contractual completion date.

We have therefore been instructed by our client to demand from you, as we hereby do, immediate re-payment of the sum of R318 499.13 paid by our client to yourselves.

Unless the total amount is paid to our offices on or before the close of business on Friday 04 December 2015 legal action will be taken against you for the recovery thereof without further notice.”

[14] Shorn of verbiage, the *bona fide* defence relied on by the defendant is that the defendant was never afforded the opportunity to remedy the perceived defect, and it pre-emptively cancelled the contract, which amounted to repudiation. The defendant has further adopted the stance that it has counterclaim against the plaintiff.

[15] On the one hand the plaintiff alleges that the contract was time sensitive, and the tank was to be completed, installed and operational by 14 December 2015, whilst on the other hand the defendant is of the view that the date of delivery was never discussed, nor was an indication given that the time of delivery of the tank was of the essence.

[16] It is trite law that failure to perform at the time when, or during the period within which, performance is due is, in the absence of a lawful excuse, a breach of contract because it is failure to do what one has contracted to do.²

[17] The central issue in this case is whether the parties reached agreement in relation to when performance was to be due. This is so because on the authority of *Alfred Mc Alpine & Son (Pty) Ltd v Transvaal Provincial Administration*-³

“[I]n the case of a contract in which no time for performance has been fixed, the debtor must be placed *in mora* by *interpellatio* before damages can be claimed on the grounds of such debtor’s non-timeous performance. A mere failure to perform or mere non-performance in the absence of fixed time for a performance, although it may constitute a ground for defence of *expetio non adimpleti contractus*, cannot give rise to a claim for damages because it can never be a breach.”⁴

² Kerr AJ, *Principles of the Law of Contract*, Butterworths Durban, 4 ed at 445.

³ 1977 (4) SA 310 (T); see also *Ponisammy v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) at 387.

⁴ *Alfred McAlpine* *ibid* at 348 D-F; compare *Broederick Properties Ltd v Rood* 1962 (4) SA 447 (T), where a different approach was adopted.

[18] Contrary to the plaintiff's contention, this case does not concern impossibility of performance. It is indeed more the lackadaisical attitude of the defendant towards its obligations⁵ that is the *fons et origo* of the main action

[19] In my view, the defendant's *bona fide* defence has been set out in the precise and appropriate manner. Were the defendant's contention that agreement was not reached as to the time for completing the task to prevail, the following would ensue:

19.1 the summons would lack the averment that the defendant was afforded the opportunity to remedy its breach, to no avail, which is necessary to sustain a cause of action for cancellation; and

19.2 the cancellation of the contract would, on the authority of *Alfred Mc Alpine*,⁶ have occurred prematurely.

[20] In light of the factual dispute besetting the main action referred to in paragraph 15 above, this court is precluded from granting summary judgment.

[21] In the result-

21.1 summary judgment is hereby refused;

21.2 the defendant is granted leave to defend the main action; and

21.3 costs of the summary judgment application shall stand over for determination by the court hearing the main action.

⁵ The alleged failure on the part of the defendant to deliver goods timeously
⁶ *Supra*.

S M MBENENGE

JUDGE OF THE HIGH COURT

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Date heard : 1 March 2016

Judgement delivered : 19 April 2016